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NO. 02-355

(9)

In the Supreme Court of the United States

SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC.,

Petitioner,

v.

PETER VEECK D/B/A REGIONALWEB,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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29 pp

QUESTION PRESENTED

Does an entity's copyright in a text it proposes to the government for adoption as a criminal law extend to such law after adoption so as to bar an individual from publishing the text of that law?

RULE 14.1(b) STATEMENT

Respondent Peter Veeck is an individual operating a not-for-profit website <http://regionweb.texoma.net>.

The court should also be aware that the Southern Building Code Congress International, Inc. ("SBCCI") has integrated with the other three U.S. based building code organizations (Building Officials and Code Administrators International or BOCA and the International Conference of Building Officials or ICBO) into one organization, the International Code Council or ICC, http://www.intlcode.org/newsletter/nr100102.consolidation.htm>. These entities no longer have separate existence or membership.

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I.
INTRODUCTION

In this case, the Fifth Circuit held that the petitioner's copyrights in model building codes it proposed to the cities of Anna and Savoy, Texas did not extend to the laws incorporating the proposed texts. Thus, the Southern Building Code Congress International ("SBCCI") could not invoke copyright of the model to prevent respondent Peter Veeck from publishing the law of Anna and Savoy, Texas, on his non-profit website. That decision was based upon three independent grounds: the Act's merger/non-extension doctrine, the conclusion that governments must be deemed the authors and owners of the laws they enact, and an analysis of the judicial history of the subject. SBCCI fails to fairly or meaningfully address the court's holding on any of these points. This brief will focus on the merger and authorship issues. The Fifth Circuit's thoughtful and thorough review of the judicial history needs no explication.

II.
SUMMARY OF THE ARGUMENT

This Court should deny SBCCI's Petition for Certiorari for the following reasons:

1. SBCCI's petition does not fairly or meaningfully deal with the issues decided by the Fifth Circuit. For instance, it fails to address the Fifth Circuit's conclusion that Mr. Veeck only published the uncopyrightable laws of Anna and Savoy, Texas, on his not-for-profit public service website <http://regionalweb.texoma.net> rather than the copyrighted model of SBCCI. And it fails to address the Fifth Circuit's conclusion that the public is the author and owner of public laws so that they are available for anyone to publish.

2. There is no split among the circuits on the issues decided by the Fifth Circuit -- the "merger doctrine" and the ownership/authorship issues. Nor is there a circuit split on the statutory issues SBCCI claims impact this case -- 17 U.S.C. §§ 101, 105 and 201(e). The statutory and regulatory

issues SBCCI raises are essentially irrelevant to the court of appeals' decision. The cases SBCCI cites are distinguishable on the nature of the works involved--they don't involve laws governing primary conduct enforced by criminal sanctions[1]; *Practice Management Information, Inc. v. AMA*, 121 F.3d 516 (9th Cir. 1997), cert denied 1998 W.L. 54150 S.Ct (1998) was decided on other grounds (copyright misuse) and its dicta regarding "due process" is irrelevant [as are the comments in *CCC Info. Serv., Inc. v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61, 73-74 (2nd Cir. 1994)] because the Fifth Circuit explicitly explained that its holding was not on such ground but on the concept of public authorship and ownership of laws. Furthermore, those cases recognized the existence and applicability of the due process doctrine, but merely failed to find the due process issue sufficiently significant under the specific facts of those cases to be dispositive.

3. This case was correctly decided by the Fifth Circuit after very extensive briefing and careful consideration.

4. There are other bases for the result below, not discussed by the court nor alluded to in the petition (fair use, copyright misuse, First Amendment speech, due process and common law waiver) which may properly be invoked by Mr. Veeck as alternative grounds for affirmance should this Court grant the petition.

III.
STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions reproduced in the Petition for Certiorari, this case involves the following statutory, regulatory and constitutional provisions:

17 U.S.C. § 102(b):

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[1]The model laws proposed by SBCCI and adopted by Anna and Savoy are not simply technical standards or specifications, but are designed and intended to be complete systems for defining required conduct, compelling and verifying performance, and punishing violations. They provide for inspections (with and without warrants) and specify criminal and civil consequences.

> In **no case** does copyright protection for an original work of authorship **extend** to **any** idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. (emphasis added)

17 U.S.C. § 107:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Compendium of Copyright Office Practices (Compendium II) section 206.01:

> Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.

Constitution of the United States, Amendment I:

> Congress shall make no law ... abridging the freedom of speech, or of the press ....

IV.
REASONS FOR DENYING THE WRIT

A. THE PETITION MISCHARACTERIZES THE ISSUES PRESENTED TO AND DECIDED BY THE FIFTH CIRCUIT

The Fifth Circuit decided *en banc* that neither 17 U.S.C. § 102(b) (the Copyright Act's fact-idea/exclusion or "non-extension" doctrine) nor the concepts of authorship/ownership allow the

extension of copyrights in model laws to enacted statutes. SBCCI fails to mention §102(b) in its disclosure of "Statutory Provisions Involved" or its table of authorities, and discusses the "merger" doctrine in the body of its petition as if it were exclusively of common law origin. It misrepresents the second basis of the *en banc* decision as merely based on due process and fails to address the authorship/ ownership concept expressed by the court.

SBCCI misstates both the merger and authorship issues as follows:

> [Merger] Are **not-for-profit** organizations that create copyrighted model codes and **standards divested** of their rights under the Copyright Act when a **federal** agency or state or local government adopts requirements which incorporate the copyrighted material by reference?
>
> [Authorship] Is there a **due process** right of "**access to the law**" as enacted which **invalidates** the statutory copyright of model codes and **standards** once governments incorporate them by reference, even when the model codes are **widely and readily accessible** to potential users on **reasonable terms**?

However, the rule of law SBCCI seeks to establish is not limited to "not-for-profit" corporations, but would equally benefit for-profit lobbyists[2] who propose texts for adoption as "the law." More importantly, this case is not about *divestiture* nor *invalidation* of copyrights in the models, but whether copyrights **extend** to laws incorporating the copyrighted language proposed. The Fifth Circuit explicitly held that copyrights in models remain enforceable, but faithfully applied the statutory language of § 102(b) when it ruled that such copyrights do not *extend* to and monopolize an enacted law, especially where (a) the author asks the government to promulgate such

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[2] Copyright attaches to a "work" (including that of a lobbyist proposing a particular text for adoption) as soon as it is "fixed," [17 U.S.C. Sec 102(a)] and neither registration nor notice is required for such exclusive control. As the court pointed out, below, "SBCCI offers no outer limit on claims of copyright prerogatives by nongovernmental persons." *Veeck* at 798.

provision, and (b) the alleged infringer identifies the posted text as the law of the enacting jurisdiction (not as the model code[3]), factors SBCCI completely ignores in its formulation of the issues.

SBCCI's second issue contains two presumptions: (1) that this question should be decided on a case-by-case basis involving a fact-intensive inquiry [a proposition which the Fifth Circuit rejected (293 F.3d 297, 800)], and (2) that the codes in question were "widely and readily accessible in the city on reasonable terms." However, it fails to define those "criteria" so they may be objectively and consistently applied, and ignores the fact that there were serious limitations on the availability of the building codes in question in Anna and Savoy, Texas.

The extent to which the codes were available in Savoy and Anna, Texas is found in Peter Veeck's summary judgment affidavit. He testified that the municipal codes of the small community of Anna, Texas were not available due to the absence of the city clerk on the two occasions when he tried to see them [R-602]. Savoy ordered one copy which "was someplace down at public works. The clerk didn't know where or who had it." [R-139, lines 12-22]. Neither town has a library or bookstore [R-601]. The full set of building codes cost Mr. Veeck $385,[4] and could only be purchased from SBCCI. Thus, SBCCI's second question contains factual predicates which are contradicted by the record in this case.

Moreover, SBCCI misrepresents the Fifth Circuit's decision as being based upon "due process," when it was not. Rather, the court's reasoning was as follows:

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[3] The court noted that:

> By analogy, the result in this case would have been different if Veeck had published not the building codes of Anna and Savoy, Texas, but the SBCCI model codes, as model codes. *Id.* 805.

[4] SBCCI charges the following for its 1994 and 1997 model codes (SBCCI refers to them as its "Standard Codes") when bought individually rather than as a package: Standard Building Code©, $72.00/82.50; Standard Plumbing Code©, $57.00/63.00; Standard Fire Prevention Code©, $57.00/60.00; Standard Existing Buildings Code©, $52.50; Standard Mechanical Code©, $57.00; Standard Gas Code©, $57.00/60.00; and the Standard Swimming Pool Code©, $10.00. [R-70].

> Even when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of "the law." In performing their function, the lawmakers represent the public will, and the public are the final "authors" of the law. ...
>
> > The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.
>
> [*Building Officials & Code Adm. v. Code Technology, Inc.*,] 628 F.2d [730,] at 734 [(1st Cir. 1980)]. This "metaphorical concept of citizen authorship" together with the need for citizens to have free access to the laws are the ultimate holding of *Banks* [*v. Manchester*, 128 U.S. 244 (1888)]. *Id.*

Veeck v. SBCCI, 293 F.3d at 799. The Fifth Circuit went on to explain that:

> *Banks* does not use the term "due process." There is also no suggestion that the *Banks* concept of free access to the law is a factual determination or is limited to due process, as the term is understood today. Instead, public ownership of the law means precisely that "the law" is in the "public domain" for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its complexities, it would seem that he could do so. In our view, to say, as *Banks* does, that the law is "free for publication to all" is to expand, not factually limit, the extent of its availability.

Id.

A copyright holder determines if, when, and how the public may access its works. It charges whatever it wishes. That may be desirable where compliance with the work is not required by the government. But, where the work is the social compact by which the public agrees to certain conduct (which agreement we are all presumed to know and compelled to obey), the parties to that

compact must be the owners of that text and have a basic right to freely access their agreement so they may know and comply with its terms.[5]

B. THERE IS NO CONFLICT AMONG THE CIRCUITS

There is no circuit split on the issue of whether "the law, which, binding every citizen, is *free for publication to all....*" *Banks v. Manchester*, 128 U.S. at 253. (emphasis added). The cases SBCCI cites do not say that laws (especially complete regulatory schemes, as ours) are subject to copyright, nor do they deny the requirement of *freedom to publish* in order to maximize access to penal laws. Rather, the question before the Second Circuit was not whether copyright barred the publication of a law actually adopted by a government body, but whether a copyrighted document that was simply *referred to* in a law or regulation could be freely copied. *See CCC Information Services v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994) (New York statute referring to the "Red Book" of automobile values as an alternative for use in settling claims); *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516 (9th Cir.) (federal regulation requiring use of AMA coding system for doctor services), *cert. denied*, 522 U.S. 933 (1997).[6] Nor, is *Veeck* in conflict with *Co. of Suffolk V. First Amer. Real Estate Solutions*, 261 F.3d 179, 193, 194 (2nd. Cir. 2001), which is separately discussed, below. In *Suffolk Co.*, which was

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[5]The right to publish vindicated in *Banks* is rooted in the public's right to access, just as in the context of First Amendment speech. The constitutional guarantee of free speech "serves significant societal interests" wholly apart from the speaker's interest in self-expression. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). [By protecting those who wish to enter the marketplace of ideas from government attack], the First Amendment protects the public's interest in receiving information. See *Thornhill v. Alabama*, 310 U.S.88, 102 (1940); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-864 (1974) (Powell, J.,dissenting). See, also, *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975), holding that a newspaper may raise an advertiser's First Amendment right of speech in its own defense because of "the transcendent value to all society of constitutionally protected expression."

[6] In addition, *Practice Management* was actually decided in favor of the alleged infringer on other grounds (copyright misuse), so its comments about the validity of the copyright were dicta.

decided subsequent to *CCC Information Services*, the Second Circuit recognized the principle that "no one may own a copyright in statutes."

As the Fifth Circuit majority recognized, this distinction is critical. Unlike the cases on which SBCCI relies,

> This case does not involve references to extrinsic standards. Instead, it concerns the wholesale adoption of a model code promoted by its author, SBCCI, precisely for use as legislation. Case law that derives from official incorporation of extrinsic standards is distinguishable in reasoning and result.

293 F.3d at 804. SBCCI points to no cases that reach a result different from that of the *en banc* Fifth Circuit on the issue whether copyright may be invoked to prevent publication of the text of a law adopted by a government body. Absent such conflicting authority on the authorship/ownership issue, there is no pressing need for resolution of the issue by this Court.

Moreover, the cases on which SBCCI relies are not only distinguishable, but are also reconcilable in principle with the result below. *Practice Management Information, Inc. v. AMA*, for example, did not say there is no right to freely access the law. Rather, the court stated, in *dicta*, that "[t]he second consideration underlying *Banks* -- the due process requirement of free access to the law --may be relevant but does not justify termination of the AMA's copyright." *Practice Management* at 519. Thus, *Practice Management* recognized the "requirement" vindicated by the Fifth Circuit, below (albeit in terms of "ownership" rather than "due process") and is consistent rather than in conflict with *Veeck* on even the more limited due process issue. The Ninth Circuit merely opined that abrogating the AMA's copyright was not the proper remedy under that particular set of facts (i.e., where the AMA publication defined the format used in filing Medicare claims and there was "no evidence that anyone wishing to use the CPT has [any] difficulty obtaining access to it"). *Practice Management* at 519.

Furthermore, *Practice Management* was premised on the conclusion that there was no evidence that "the AMA has restricted access to users or intends to do so in the future." Clearly, that is not the case here, where SBCCI actually ordered a citizen to stop his public service posting and where the record demonstrates significant restriction due to price and availability.

In *CCC Info. Serv., Inc. v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61, 73-74 (2nd Cir. 1994), the Second Circuit also specifically recognized that "there are indeed policy considerations that support CCC's argument [that the Red Book was in the public domain by reason of the government's reference]..." However, the court found that countervailing considerations were stronger in that particular case, citing the "takings clause of the Constitution." But, the "takings" consideration does not apply in our case since SBCCI's model codes were adopted by Anna and Savoy at SBCCI's request. The "takings" issue, moreover, can be addressed in terms of compensation rather than allowing private parties to control access to the law.

Indeed, the Second Circuit's position on this issue is better stated in *Co. of Suffolk*, supra, which involved government authored maps which would have apparently been copyrightable if published by a private party. The issue was whether all materials created by or for a governmental entity are in the public domain as a matter of due process. It vacated a dismissal on the pleadings (i.e. all plaintiff's allegations were assumed true) and remanded on the issues of whether the tax maps created by the county fell into the public domain as a matter of due process and whether they were sufficiently original to merit copyright protection in the first place. *Veeck* involves the very situation which the Second Circuit said would put works in the public domain:

> Here, the tax maps themselves do not create the legal obligation to pay property taxes but are merely a means by which the government assesses a pre-existing obligation. The fair warning" required under the Due Process Clause is satisfied through the notice provided by the statute that establishes the obligation to pay property taxes.

> There is no allegation that notice of this statute is not generally available ... Notice concerns simply are not present here. [citation omitted] (*Suffolk*, 195)

However, *Suffolk Co* at 194 contains this comment in the due process context:

> ...two considerations influence whether a particular work may be properly deemed in the public domain: (1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law.

Thus, *Suffolk Co*, like *Practice Management* and *CCC* concludes that there is a due process basis for holding laws are in the public domain. Clearly, the public needs notice of the codes of Anna and Savoy, Texas. And, as the Fifth Circuit points out, SBCCI does not get its incentive to write laws from the potential for profit from sales of those laws.

Suffolk Co. indicates that proper inquiry is whether economic incentives are required for the *government* to produce such works, stating that "*Banks* is properly read as requiring a determination whether the particular governmental entity or employee has adequate incentive to create the work absent copyright protections...Judges and legislators do not need additional economic incentives to, respectively, write opinions or enact legislation." and "legislators do not need additional economic incentives to...enact legislation." *Suffolk Co.* at 194.

The purpose of the Copyright Act is to encourage creative work. If that work will be done without such incentive, the constitutional and statutory purposes will be achieved and there is no ground for abridging First Amendment speech. Thus, the 2nd Circuit apparently concludes that laws are in the public domain by their very nature.

The above language in *Suffolk Co.* indicates that all laws are in the public domain and does not require a case-by-case fact intensive inquiry. Thus, it appears that the Second Circuit (the court which decided *CCC*), would have found the laws to be in the public domain as a matter of due process.

C. THE FIFTH CIRCUIT'S DECISION IS CORRECT

1. The Fifth Circuit Correctly Applied 17 U.S.C. § 102(b)

The result in this case can be explained and upheld on the limited statutory merger issue.

17 U.S.C. §102(b) is clear and unambiguous, and courts must apply that statute according to its plain meaning.

> In **no case** does copyright protection for an original work of authorship ***extend*** to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. (emphasis added)

SBCCI completely ignores the statutory language. On page 16 of its petition, SBCCI claims:

> 3. Despite these unambiguous provisions of federal law, the en banc majority invented an exception to the copyright owned by drafters of model codes, holding that adoption into law throws the codes into the public domain. Short of a constitutional violation, the court needed at least a statutory hook in the Copyright Act on which to hang such an exception. It had none.

SBCCI then mistakenly claims that "[t]he *en banc* majority fundamentally misunderstood the important but limited doctrine of 'merger'..." The Fifth Circuit did not, as SBCCI claims, *divest* SBCCI of its copyrights in the models, but correctly obeyed § 102(b) in holding that copyrights do not *extend* to laws.

A law is an "idea, procedure, process, system, method of operation, concept, principle, or discovery" as contemplated by § 102(b). Laws are also "facts" because they can only be expressed in one or a few ways, and thus merge with their expression and enter the public domain pursuant to the so called "fact-expression merger doctrine." *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 US 340 (1991).

Beginning on page 21, SBCCI writes:

> 5... Suppose that instead of arguing that SBCCI's model codes "merged" with the "fact" of the law upon enactment, Veeck argued that Irvine Welsh's final draft of

> Trainspotting merged with the fact of being the novel Trainspotting upon publication. True, that is the unique expression of the book Trainspotting. No responsible observer, however, would think that the impossibility of conveying this novel in any way other than through the exact text of the novel nullified Welsh's copyright. The relevant point is that the novel is a unique expression of something particular. Others are free, however, to address the same subject in their own ways. (Emphasis added.)

The misunderstanding SBCCI exposes by this comment is its own, rather than the court's. Contrary to SBCCI's assertion, "[o]thers are [not] free ... to address the same subject in their own ways" and claim that their expressions are the law of Anna, Texas. The "fact" which is "merged" is not "of being the novel" (that would be like saying that the expression is the expression), but the idea expressed. Unlike the story expressed by Welch, which can be told in a multitude of ways, the law is so intimately tied to its expression that the change of a comma, preposition or article can change its command.

Every word of the law is critical and subject to balance and interpretation. The various shades and nuances of the law can only be authoritatively determined by reference to the exact language and not simply to someone else's paraphrase, restatement or interpretation (which, of course, would be subject to copyright). Thus, the idea which the legislature has converted into a law at the request of SBCCI is merged with the expression into something more and different than the model.

The "law," as opposed to a story, is a "fact" for the purpose of "merger" because it is the unique, authoritative expression of the command, and, thus, has the power to compel actions. Any other expression is more akin to an opinion, interpretation, explanation or variation on a theme which can be expressed in numerous ways. That distinction is illustrated by comparing SBCCI's version of the merger doctrine with the actual words of the Copyright Act to determine what the Copyright Act law actually requires in this case.

Finally, SBCCI argues that the merger doctrine does not apply because people could propose other laws than those adopted by Anna and Savoy, Texas. However, the fact that other people may express other judgments and that other codes can be created dealing with the same subject matter does not change the reality underlying the merger doctrine and its application in this case. There may be thousands of other ideas of what the law should be. But, there is only one authoritative expression of the Building Code for the City of Anna, Texas, as adopted by its legislative body. Thus the Fifth Circuit held that copyright in a model code may not extend to monopolize access to that crystallization of the concept of the law which is in fact enacted.

2. Authorship/Ownership

The Fifth Circuit's concurrent holding that the text of laws falls outside the scope of copyright because the government, and not any private party, is the author and owner of the law likewise reflects a faithful and correct application of this Court's precedents, most prominent among them the decision in *Banks v. Manchester*. The Fifth Circuit's holding that the public is the owner and author of its laws also finds support in the Copyright Act, the Copyright Clause of the Constitution, the interpretation of those authorities by the Copyright office, as well as our own common sense.

The Fifth Circuit's authorship holding reflects the fact that the enactment of model codes as law is transformative. The public bodies create something new and unique which only they are in a position to author. This Court focused upon that criteria in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 127 L.Ed.2d 500, 515 (1994) in the context of "the purpose and character of the use" criteria of "fair use" [Copyright Act, 17 U.S.C. §107]:

> The inquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. The heart of any parodist's claim to quote from existing material is the use of some elements

> of a prior author's composition to create a new one that, at least in part, comments on that author's work.

That concept was further discussed in *Leibovitz v Paramount Pictures*, 137 F.3d 109 (2nd Cir. 1998).

Moreover, Article 1, 8, 8 does not create a Constitutional copyright in literary works, but, rather, is a limitation on Congressional power to legislate in that regard. Only laws aimed at "promoting science and the useful arts" are permitted. *Sony Corp. v. Universal Studios, Inc.*, 464 US 417, 428-434 (1984); *Feist Publications v. Rural Telephone Service, Inc.*, 499 U.S. 340 (1991); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Congress is presumed to have intended its enactment to comply with this "public interest" limitation as well as those protecting speech and guaranteeing due process. That precise principle was recognized by the federal agency responsible for interpreting the Copyright Act[7] in its Compendium of Copyright Office Practices (Compendium II) section 206.01:

> Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.

Thus, SBCCI argues that *Banks* was based on a finding that Congress lacked the power to allow copyright of judicial opinions because that incentive is not necessary to encourage judges to do their work. While the Fifth Circuit rejected that reading of *Banks* as being too limited, it would still have reached the same result had it employed that analysis. The Fifth Circuit noted that copyright profit is not what motivates SBCCI to write codes. *Id.* at 806.

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[7] *United States v. Mead Corp.*, 533 U.S. 218, __, 121 S. Ct. 2164, 2175 (2001) [noting that even where an agency's interpretation of law is not entitled to highly deferential treatment pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944))].

Furthermore, *Sony* reiterated this Court's previous holdings that the copyright law makes reward to the owner a secondary consideration since the sole interest of the United States and the primary object of the statutory scheme lie in the general benefits derived by the public. This Court went on to reaffirm the approach set out in *Twentieth Century Music Corp. v. Aiken*, 422 US 151, 156, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975) that:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest; Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. Even where material is subject to copyright protection, "[a]ll reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain," *Sony* at 432.

Since the statute does not, on its face, allow private copyrights of statutes, the constitutional rights, public interest and judicial history compel the conclusion that public enactments are in the public domain as a matter of constitutional law and statutory construction. If Congress intended there to be copyrights of the law, it has had the opportunity to say so after each case suggesting the contrary.[8]

Even the panel majority correctly understood this concern and found that

> ...as a matter of public policy, [the law is] not subject to copyright because the public interest is served by free access to the law...because "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all. . . ." [fn *Banks v. Manchester*] This point would seem to apply equally to any statute, ordinance, or regulation that has the force of law irrespective of authorship. *Veeck v. SBCCI* panel decision, Petitioner's Appendix, p. 76a.

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[8] *Sony Corp v. Universal Studios, Inc.*, 464 U.S. 417 (1984); http://laws.findlaw.com/US/464/417.html. Section II of the decision in *Sony*, supra, strongly cautions judicial restraint. The constitution makes it plain that:

> ...it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors... to give the public appropriate access to their work product. Because this task involves a difficult balance between the interest of authors... in the control and exploitation of their writings... on the one hand, and society's competing interest in the free flow of ideas, information and commerce on the other hand, our patent and copyright statutes have been amended repeatedly. [464 U.S. 417, 430]...In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a never contemplated such a calculus of interests. [464 U.S. 417, 432].

But without reference to any criteria, recognized principles of law nor any analysis of the factors considered or weighed, the panel majority concluded that "...extrapolating broad generalities from such a narrow holding is risky...." And, it made

> ...a policy judgment ... balancing of the public interests in, on the one hand, encouraging innovation through copyright and, on the other hand, ensuring free access to the law. We...perceive the scale of countervailing policy considerations to be tipped in favor of enforcing SBCCI's copyright. *Veeck v. SBCCI* panel decision, Petitioner's Appendix, p. 77a.

The *en banc* majority apparently found that the panel had ruled arbitrarily in that regard.

3. §§ 101, 105, and 201(E) of the Copyright Act Do Not Support SBCCI's Position

SBCCI claims that the Fifth Circuit's ruling is contrary to the Copyright Act, citing §§ 101 and 105 (which together prohibit copyrights in works by or for the federal government) and 201(e) (1999) (prohibiting expropriation of copyrights). First the court observed that, §§ 101 and 105 are not intended to deal with the issues in our case. Congress's decision not to allow copyright in works produced for the federal government does not mean it intended to grant the power to copyright everything else. Section 102(b) must have some application!

And, as the Court explained, section 201(e) (prohibiting expropriation of copyrighted materials by governments) does not contradict its decision. SBCCI simply fails to parse section 201(e) to determine its application.

> (e) **Involuntary** Transfer. -- When an individual author's ownership of a copyright or of any of the exclusive rights under a copyright has not previously been transferred **voluntarily** by that **individual author**, no **action by any governmental body** or other official or organization **purporting** to **seize, expropriate, transfer or exercise rights of ownerships** with respect to the copyright or any of the exclusive rights under a copyright shall be given effect under this title except as provided under Title 11. (emphasis added).

As the Court pointed out, SBCCI **voluntarily** gave the cities of Savoy and Anna permission to use the codes in question as their own law. Thus, **Savoy and Anna did not expropriate anything** by

such use. Nor, are we dealing with an act **purporting** to seize, expropriate, transfer or exercise the rights created by the Act. The consequences of SBCCI urging the adoption and Anna acceding to such request by adopting the proposed text was not an expropriation or other act purporting to take SBCCI's property, but a licensed use which had certain consequences, including those of the merger doctrine and that of authorship/ownership of the adopting government recognized in *Banks*. Section 201(e) does not apply in our case. Whether it applies where the use is not with permission may be for another case to decide.

Furthermore, SBCCI is not an "individual author" as contemplated by the Act. All terms in a statute are presumed to have meaning and no interpretation should be applied which ignores a term or makes it mere surplusage. *Potter v. United States*, 155 U.S. 438, 446 (1894); *National Credit Administration v. First National Bank and Trust Co.*, 522 U.S. 479, 481 (1998); *Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 472 (1997). The meaning of the term "individual author" must be determined in that context. See 17 U.S.C. §101.

The copyright statute recognizes and protects the rights of natural persons as authors. The only instance in which it invests non-human entities with rights as authors is under the "work for hire" fiction vesting rights in the employer. The reference to "individual author" relates back to these two categories (i.e. "natural persons" as "authors" and works for hire) in the statutory scheme and protects individual natural persons. Any other interpretation makes the reference to "individual" (in connection with "author") meaningless surplusage.

4. SBCCI's Other Attacks on the Fifth Circuit's Decision Are Meritless

Even SBCCI acknowledges that the exclusive statutory rights under the Copyright Act can not be extended to entirely prevent public access to the binding statutory law of the citizenry. It merely argues that the Fifth Circuit should have engaged in a fact-specific inquiry into the adequacy

of the public's access to th as controlled by SBCCI) and that the acc llows – for a price – is sufficient. In effect, SBCCI argues that private parties should serve as the gatekeepers to public laws. Mr. Veeck suggests that such approach will effectively nullify the right vindicated in *Banks*.

Indeed, this case demonstrates the problem with the kind of fact intensive case-by-case inquiry that SBCCI contends is the appropriate way to determine whether laws are in the public domain. Sufficiency of access, like beauty, is entirely in the eyes of the beholder. Some judges may consider the access demonstrated by our facts to be sufficient while others may not. SBCCI offers no meaningful test for sufficiency to guide courts in the exercise of judicial discretion so as to avoid arbitrary results. Making the right to publish and, thus, liability for a citizen like Mr. Veeck for erring in that regard, subject to a case by case, fact intensive inquiry will chill the exercise of the right and surely make it more apparent than real.[9]

SBCCI further contends (based on its misconstruction of the Fifth Circuit's holding as being based primarily upon constitutional "due process") that the public interests in access are limited and fully vindicated by a "lack of access" defense in criminal prosecutions. [Petition, p. 20] But the availability of such defense is not adequate, nor does it address all of the public's interests in access. The state is interested in compliance with building codes, not punishing violators. The individual is interested in knowing and complying with the law rather than defending and being found not guilty

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[9] *Smith v. California*, 361 U.S. 147, 150 (1959) held:

> For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . [H]is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally [376 U S. 254, 279] suppress directly. The bookseller's self censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

of a crime. SBCCI does not suggest that criminal exculpation is an adequate remedy for being required to demolish a substandard building, suffering catastrophic physical harm, facing civil liability for negligence, or being subjected to the expense and pain of having to defend a criminal charge resulting from ignorance of the law.[10] The right recognized and enunciated by this Court in *Banks* is the right of someone like Mr. Veeck to freely publish the law so as to maximize public access rather than the existence of a defense to prosecution under a law to which she was denied access.

Moreover, SBCCI misses the point when it argues that "at no time in our history has government at any level perceived a constitutional obligation to supply to every citizen a *personal copy* of the text of every form of law, statutory and judicial, *for free*." [Petition, p. 18.] The issue here is the right of a citizen to *publish* the law, not the duty of government to make it known. It is not a question of whether the government must provide everybody a copy of its building codes, but whether the Copyright Act can be used as a barrier to public access so that a philanthropist wishing to publish the law as a public service has to get SBCCI's permission or buy all the copies from that source. The Fifth Circuit merely held that the Copyright Act does not have that effect.

SBCCI's warnings about the supposed dire consequences of the Fifth Circuit's ruling are similarly misguided. The suggestion that the Fifth Circuit's analysis would negate the copyright of any work whenever it is so much as mentioned by the government (for example, in a school reading list), is obviously incorrect. The Fifth Circuit's decision was explicitly limited to laws and not applied to reference materials. As the court explained:

> If a statute refers to the Red Book or to specific school books, the law requires citizens to consult or use a copyrighted work in the process of fulfilling their obligations. The copyrighted works do not "become law" merely because a statute

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[10] *Marathon Corp. v. Pitzner Ex Rel. Pitzner*, 55 S.W.3d 114, 130 (Tex.App.--2001) held that a premises owner is liable per se (as a matter of law) for a repairman's injuries while working on an air conditioner installed by a contractor in violation of the building code, of which the owner was held to have had "constructive knowledge."

> refers to them. See 1 *Goldstein Copyright*, § 2.49 at n. 45.2 (noting that *CCC* and *Practice Management* "involved compilations of data that had received governmental approval, not content that had been enacted into positive law"). Equally important, the referenced works or standards in *CCC* and *Practice Management* were created by private groups for reasons other than incorporation into law. To the extent incentives are relevant to the existence of copyright protection, the authors in these cases deserve incentives. And neither *CCC* nor *AMA* solicited incorporation of their standards by legislators or regulators. In the case of a model code, on the other hand, the text of the model serves no other purpose than to become law. SBCCI operates with the sole motive and purpose of creating codes that will become obligatory in law.

293 F.3d at 804-05.

Second, the record does not substantiate any likelihood of harm to SBCCI (nor, by extension, the model code industry) if it can not claim copyright to the codes of Anna and Savoy (or any other jurisdiction).[11] SBCCI publishes the Florida Building Code on its own website <http://www.sbcci.org/floridacodes.htm>; allows the publication of the North Carolina Building Code Enforcement Officers organization online; it admits on page 20 of its petition that "limited copying of excerpts would have little effect on the market for sale of model codes. That market is composed primarily of construction professionals and manufacturers, who need the entire codes. The market is not individual consumers..." There is no evidence that the construction professionals' or

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[11]Indeed, our record is to the contrary. Brad Ware, in his testimony before the Magistrate on SBCCI's motion for preliminary injunction, testified that the price for the works is not based upon the cost of producing and selling such works, but is arbitrarily arrived at by SBCCI. [Ware testimony before Magistrate Judge, August 24, 1998, pp. 26-27, Tab A]. And he testified that SBCCI had not considered any other funding model and that some other funding mechanism might work as well as one based upon a monopoly in the sale of Municipal Codes.

Q You could choose to raise money for your operations through an increase in dues, couldn't you?
A I suppose so.
Q You could choose to have some other form of assessment on people who used your codes, right?
A I -- yes.
Q You could charge license fees, right?
A Yes.
Q Instead, you have chosen to make your money through sales, or some of your money through sales, right?
A That's correct.
Q But you're not telling the Court that the -- that you know that entities such as yours would cease existing if they had to choose another mode of operation, are you?
A No, I'm not saying that. I can't -- I can't determine that.

[Ware testimony before Magistrate Judge, August 24, 1998, pp. 32-33, Tab A.].

manufacturers' market would be affected by the availability of the codes of particular jurisdictions on the Internet, especially if the price charged for hard copies and CDS is reasonable for such professional users (as SBCCI claims it to be). Petition, p. 3. And, more significantly, there is no reason to believe that SBCCI or any other code writing organization will go out of business if it suffers a decrease in sales and has to make up the shortfall through some other mechanism such as license fees or increased dues.

The National Congress of Commissioners on Uniform State Laws (NCCUSL), author of numerous laws such as the Uniform Commercial Code, exemplifies the ability to fund the basic governmental function of writing laws the same way governments pay for copiers and other things they need – through direct payment. We are not discussing the end of code writing organizations, but a possible change in the way they raise some of their money. Thus, this Court should not be swayed by the warnings of dire consequences flowing from the Fifth Circuit's decision.

> As one commentator explained, . . . it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them. 1 *Goldstein* § 2.5.2, at 2:51.(22).

293 F.3d at 806.

Moreover, any argument that state, local and federal governments will profoundly suffer should this Court not reverse the Fifth Circuit's decision is belied by the **amicus brief supporting Veeck** filed by **ten states (including Texas) and Puerto Rico**, below. These entities charged with making such evaluation tell us that the public interest is not served by governmentally created and enforced private monopolies in the publication of the law, but in free access. See, also, Compendium II § 206.01.

D. THE PETITION DOES NOT ADDRESS THE ALTERNATIVE GROUNDS FOR THE RESULT THAT WERE BRIEFED AND ARGUED BELOW

Unmentioned in SBCCI's Petition are the alternative grounds for the same result that were fully briefed and argued below, including that Mr. Veeck's not-for-profit publication of the laws of the Cities of Anna and Savoy, Texas, was a fair use under 17 U.S.C. § 107 even if the text of those laws is subject to SBCCI's copyright, and that the First Amendment protects Mr. Veeck's right to publish without restraint the laws adopted by those cities, regardless of any statutory copyright. Consideration of the issues tendered by SBCCI would necessarily also require the Court to consider these issues as alternative grounds for affirmance. Absent a direct conflict among the circuits on either the issues presented by SBCCI or the alternative grounds argued by Mr. Veeck, there is no reason for this Court to wade into the multiple and complex statutory and constitutional issues that are required for a complete resolution of the matter.

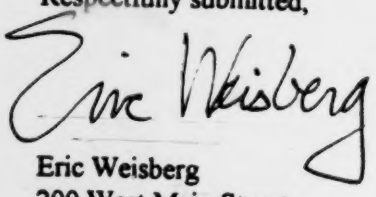
V.
CONCLUSION

SBCCI urges this Court to reverse the Fifth Circuit's carefully limited and well reasoned *en banc* decision and establish a rule which allows massive privatization of the public's law. It argues a case which has not been presented. And, it invokes the statutory protection of sec. 201(e) (against expropriation) which does not apply where the government's use was with permission and does not purport to seize or expropriate any copyright. The correct implication of SBCCI's grant of such permission to the cities of Savoy and Anna and their decision to enact the proposed language as their law was Peter Veeck's right to freely publish the law as enacted by those legislative bodies. That implication flows from the nature of the works as our common agreement, the governments' compulsion that we know and conform our conduct to such agreement, as well as our constitutional concepts of due process, free speech and free press. It also results from our common law concepts

of "waiver," "merger" an[illegible]use" and our statutory exemptions for fa[illegible]eas and "fair use."

There is no compelling reason for this Court to review the *en banc* decision of the Fifth Circuit.

Respectfully submitted,



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